

Message

From: Frank C. Pavia [fpavia@HarrisBeach.com]
Sent: 9/16/2015 6:41:41 PM
To: Charney, Lauren [Charney.Lauren@epa.gov]
CC: Mark Nicotra (mnicotra@salina.ny.us) [mnicotra@salina.ny.us]; Joseph D. Picciotti [jpicciotti@HarrisBeach.com]
Subject: Lower Ley Creek
Attachments: 2012-12-17 Final AOC Full Copy.pdf

Lauren,

It's my understanding from a recap of a conversation that Dave Nunn and Kevin Murphy had with you and James Doyle which was provided to me, EPA is questioning whether governmental PRPs have ever been carved out of the indemnification and financial assurance provisions of AOCs.

I have attached a copy of an AOC we negotiated with EPA where a governmental party was exempted from the indemnification provisions. Please see paragraph 76, internal page 30 (pdf page 33) wherein local and state governments are exempted from the indemnification requirements.

With respect to financial assurance, although there is no specific carve out for governmental entities in the attached AOC, on page 31-32 of the consent order (page 34-35 of the pdf) there are a number of tests cited which apply to a local or state government without it having to make any specific pledge (the tests are referenced as found at 40 CFR Section (or part) 264.143(f) and part 264.151 (a) (1). Because local government respondents in the attached AOC were not required to provide any kind of financial pledge, it was acceptable to those Florida municipalities that signed on as respondents.

However, in this instance, NYS law bars municipalities from making financial commitments/assurances beyond the taxing capacity of the municipality. In this instance, the Town of Salina would not be in a financial position to make what amounts to be a joint and several financial assurance for the entire Lower Ley Creek cleanup. This would be beyond the taxing authority of the Town, and in violation of NYS comptroller requirements.

If you wish to discuss this matter further, please feel free to contact me.

Frank

Frank C. Pavia
Partner

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From: Joseph D. Picciotti
Sent: Wednesday, September 16, 2015 1:04 PM

To: Frank C. Pavia

Subject: 2012-12-17 Final AOC Full Copy

Frank, final EPA consent order from the Ellis Road site. On the indemnification see paragraph 76 internal page 30 (pdf page 33) exempting the local and state governments from indemnification requirements.

On the financial assurance, there is no specific carve out for governmental entities on financial assurance, but on page 31-32 of the consent order (page 34-35 of the pdf) there are a number of tests cited which presumably might be applied to a local or state government without it having to make any specific pledge (the tests are referenced as found at 40 CFR Section (or part) 264.143(f) and part 264.151 (a) (1), Something tells me those must have been acceptable to the local government respondents because they did not require any kind of pledge etc. and could be easily satisfied, but note that on page 33 of the consent order (36 of the PDF), a sworn statement conveying the information needed to satisfy the standard is required.

The Consent Order was signed in 2012 and involved EPA Region 4 (not Region 5 as I said). Let me know if you need anything else.

Joseph D. Picciotti
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